91-476

No.

Supreme Court, U.S.
FILED
SEP 19 1991
OFFICE OF THE CLERK

IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1991

WAYNE L. TOLEN, - - - - - **Petitioner**

versus

COMMONWEALTH OF KENTUCKY - - - - - - **Respondent**

PETITION FOR WRIT OF CERTIORARI TO THE McCRACKEN CIRCUIT COURT OF THE COMMONWEALTH OF KENTUCKY

PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED FOR REVIEW

Does a Kentucky statute on the presumption of intoxication which would violate the due process clause if read as an instruction satisfy the requirements of the due process clause if read as evidence during the Commonwealth's case in chief?

PARTIES TO PROCEEDING

The parties to this proceeding are the Commonwealth of Kentucky and Petitioner Wayne L. Tolen. All parties appear in the caption of the case.

TABLE OF CONTENTS

PAGE

Question Presented for Review i
Parties to Proceeding ii
Table of Authorities iv
Opinion Below v
Jurisdiction v
Constitutional Provision and Statutes Involved.....vi–vii
Statement of the Case 1– 7
Reason for Granting Writ ..... 7 –8
Conclusion 9
Appendix:

Opinion and Order of McCracken Circuit Court entered January 29, 1991, affirming district court's judgment 1a– 4a
Judgment of McCracken District Court entered December 2, 1988 ..... 5a
Order of McCracken District Court entered February 2, 1989, overruling motion for new trial ... 6a
Motion and Grounds for New Trial and for Judgment NOV filed December 9, 1988 ..... 7a– 9a
Memorandum in Support of Motion and Grounds for New Trial filed February 2, 1989 .....10a–13a
Statement of Appeal filed March 10, 1989 .....14a–24a
Motion for Discretionary Review in Kentucky Court of Appeals filed February 27, 1991.....25a–31a
Order of Kentucky Court of Appeals Denying Discretionary Review entered April 8, 1991 ..... 32a
Motion for Discretionary Review in Kentucky Supreme Court filed April 25, 1991 .....33a–37a
Order of Supreme Court of Kentucky Denying Discretionary Review entered June 26, 1991.. 38a
McCracken District Court Instructions to Jury filed December 2, 1988 .....39a–40a
Transcript of Tape of Trial on December 2, 1988, in McCracken District Court 41a–44a

TABLE OF AUTHORITIES

Cases: PAGE

Carella v. *California*, 109 S.Ct. 2419 (1989) 5, 6, 8
City of Seattle v. *Gellein*, 768 P.2d 470 (Wash., 1989) 6
Francis v. *Franklin*, 105 S.Ct. 1965 (1985) 4, 5, 6, 8
Markham v. *Commonwealth*, Ky.App., 483 S.W.2d 122 (1972) 5
Sandstrom v. *Montana*, 99 S.Ct. 2450 (1979).....4, 5, 6, 8

Constitutional Provisions:

14th Amendment of U.S. Constitution .....iv, v, 5, 6
Section 11 of Kentucky Constitution 5, 6, 7, 8

Statutes:

KRS 189A.010 ..... vi, 2
KRS 189.520(3)(a)(b)(c) .....v, 2, 4
Title 28, Section 1257(a) iv

OPINION BELOW

The opinion and order of the McCracken Circuit Court of the Commonwealth of Kentucky is attached and appears at Appendix Pages 1-4.

JURISDICTION

The jurisdiction of this Court is invoked under Title 28, Section 1257(a), for a review of the decision of the McCracken Circuit Court of the Commonwealth of Kentucky affirming the judgment of the McCracken District Court of the Commonwealth of Kentucky.

(i) The date of the opinion and order of the McCracken Circuit Court, the appellate court, was January 29, 1991.

(ii) On April 8, 1991, the Court of Appeals of the Commonwealth of Kentucky entered an order denying discretionary review to the McCracken Circuit Court in this action (Appendix, 32).

On June 26, 1991, the Supreme Court of Kentucky entered an order denying discretionary review in this action (Appendix, 38).

(iii) Not applicable.

(iv) Title 28, Section 1257(a), confers jurisdiction on this Court to review final judgments or decrees rendered by the highest court of the Commonwealth of Kentucky in which a decision could be had where the validity of a statute of any state is drawn in question on the ground of its being repugnant to the 14th Amendment to the U.S. Constitution and where the right to due process is specially set up and claimed under the 14th Amendment to the U.S. Constitution.

CONSTITUTIONAL PROVISION AND STATUTES INVOLVED

Fourteenth Amendment to the U.S. Constitution:

"Section 1. All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws."

Kentucky Revised Statute 189.520 (3)(a)(b)(c):

"(3) In any criminal prosecution for a violation of KRS 189A.010 or subsection (1) of this section, wherein the defendant is charged with having operated a vehicle while under the influence of intoxicating beverages, the amount of alcohol in the defendant's blood as determined at the time of making an analysis of his blood, urine, breath or other bodily substance, shall give rise to the following presumptions:

(a) If there was 0.05 percent (5/100%) or less by weight of alcohol in such blood, it shall be presumed that the defendant was not under the influence of intoxicating beverages;

(b) If there was more than 0.05 percent (5/100%), but less than 0.10 percent by weight of alcohol in such blood, such fact shall not constitute a presumption that the defendant either was or was not under the influence of intoxicating beverages, but such fact may be considered, together with other competent evidence, in determining the guilt or innocence of the defendant;

(c) If there was 0.10 percent (1/10%) or more by weight of alcohol in such blood, it shall be presumed that the defendant was under the influence of intoxicating beverages."

Kentucky Revised Statute 189A.010:

"(1) No person shall operate a motor vehicle anywhere in this state while under the influence of alcohol or any other substance which may impair one's driving ability."

No. _____

IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1991

WAYNE L. TOLEN, - - - - - - - *Petitioner*

v.

COMMONWEALTH OF KENTUCKY, - - - *Respondent*

PETITION FOR WRIT OF CERTIORARI TO THE McCRACKEN CIRCUIT COURT OF THE COMMONWEALTH OF KENTUCKY

To the Honorable, the Chief Justice and Associate Justices of the Supreme Court of the United States:

Wayne Tolen, the Petitioner herein, prays that a writ of certiorari issue to review the judgment of the McCracken Circuit Court of the Commonwealth of Kentucky entered in the above entitled case on January 29, 1991.

STATEMENT OF THE CASE

Petitioner Wayne L. Tolen was operating his truck on August 25, 1987, and was going home from work about 7:00 p.m. Petitioner had had three or four drinks and stopped at Taco John's to pick up dinner for his wife and himself. He stopped at a stop light prior to going under the I-24 underpass. A car stopped in front of him and his truck eased into the bumped the automobile. There was no damage. Officer Carter, who had been proceeding in the same direction and following Tolen, stopped since he saw the

cars bump into each other. He smelled alcohol, had Tolen perform a couple of sobriety tests and was of the opinion Tolen did not pass the tests. Officer Carter told the driver of the car which had been bumped to go and call the police department and have them send another officer out to pick up Tolen since he was going off duty. Tolen was picked up, given a breathalyzer test on the old Smith and Wesson 900 and registered .17. Tolen was cited for DUI, KRS 189A.010.

On December 2, 1988, a jury trial was held in the McCracken District Court which has criminal jurisdiction to try misdemeanor cases. The Commonwealth called the two arresting officers and an officer to testify that the breathalyzer was in working order. At the conclusion of the Commonwealth's case, the Assistant County Attorney advised the Court that he wanted to get the presumptions read by the Court and it was proper to do it at the conclusion of the Commonwealth's case. Petitioner's attorney objected to reading the presumption instructions on the grounds that they were in violation of the federal and Kentucky constitution. The Court denied Petitioner's motion and read the following Kentucky Revised Statute to the jury:

> This is what we call KRS 189.520, Subsection 3, and there are three subsections of that, A, B and C. A: If there was a .05 percent, five one-hundredths percent or less by weight of alcohol in such blood, it shall be presumed that the defendant was not under the influence of intoxicating beverages. Sub B: If there was more than .05 percent, five one-hundredths percent, but less than .10 percent by weight of alcohol in such blood, such fact shall not constitute a presumption that the defendant either was or was not under the influence of intoxicating beverages, but such fact may be considered

> together with other competent evidence in determining the guilt or innocence of a defendant. Sub C: If there was .10 percent, one-tenth of a percent, or more by weight of alcohol in such blood, it shall be presumed that the defendant was under the influence of intoxicating beverages. Does that conclude your case?
> Hines: Yes, sir. (Transcript of Tape, Appendix Pages 42-43).

Petitioner then put on proof of Petitioner Wayne Tolen who testified to the same facts and admitted he was driving the automobile and had three or four drinks and there was no conflict between the officer's testimony and Petitioner Tolen's except Petitioner denied that he was operating his vehicle under the influence. Joe Viterisi, former mayor of Paducah, testified that he received a call from Tolen and went to pick him up from the McCracken County Jail. He observed Tolen who he said was coherent and he did not believe he was under the influence or that his ability to operate a vehicle was impaired at that time.

Motions were made by Petitioner for directed verdict at conclusion of the Commonwealth's and conclusion of all the evidence. The Court gave instructions to the jury which appear at Appendix Pages 39-40.

In the closing argument, the County Attorney stated as follows:

> I choose to, but at any rate, those are scientifically tested measures and in Kentucky the scientifically tested measure that goes beyond someone completely in control of their physical ability to drive is .10 percent. Now whether we like it or whether we don't, that is the law. And that's what part of what you can't put aside. You have to follow that. (Transcript of Tape, Appendix Pages 53-54).

The jury found Tolen guilty and fixed punishment at a $200.00 fine.

Tolen filed a motion and grounds for new trial and for judgment NOV (Appendix Pages 7-9). A memorandum in support of the motion and grounds for new trial was filed (Appendix Pages 10-12). It is specifically set forth in the memorandum that reading of the statutory presumptions, KRS 189.520 (3)(c), created a mandatory presumption whereby the jury must find that Tolen was driving under the influence. Two Supreme Court cases were cited, *Sandstrom* v. *Montana*, 99 S.Ct. 2450 (1979), and *Francis* v. *Franklin*, 105 S.Ct. 1965 (1985).

Initially, the federal question was raised when objection was made for the Court to read the presumptions. (Recordings in district court are made on tapes. The tape has not been officially transcribed by the McCracken Circuit Court. Petitioner has transcribed a copy of the tape and portions of the trascript from the tape are enclosed in the appendix. If the Court desires that the tape be transferred to the Court with the record, an official transcription of the tape can be made and forwarded to the Court with the tape.) The federal question was first brought to the attention of the Court when Petitioner's counsel objected to the reading of the statute containing the presumptions. The transcript shows that the rest of the Petitioner's objections were not audible or the quality to be transcribed. It was at this time that Petitioner's counsel advised the Court that the reading of the presumption violated the federal and state constitutions. The Court, in overruling Petitioner's objection, stated that the statute required him to read them and went ahead and read the presumptions (Appendix, Pages 42-43).

After the verdict, Petitioner filed a motion and grounds for new trial and for judgment NOV (Appendix, Pages 7-9). Memorandum in support of the motion and grounds for new trial was also filed (Appendix Pages 10-12). It is specifically stated in this memorandum that the reading of the mandatory presumption was unconstitutional and violated the due process clause of the 14th Amendment of the federal constitution, citing the cases of *Sandstrom* v. *Montana,* 99 S.Ct. 2450 (1979), and *Francis* v. *Franklin,* 105 S.Ct. 1965 (1985).

In the statement of appeal from the McCracken District Court to the McCracken Circuit Court, the constitution question was raised specifically by citing *Francis* v. *Franklin, supra,* and *Sandstrom* v. *Montana, supra* (Appendix, Statement of Appeal, pp. 6-11).

The McCracken Circuit Court's opinion and order affirming the district court addresses the constitutional question in the last two pages of the opinion and specifically held that it was not unconstitutional but was admissible under *Markham* v. *Commonwealth,* Ky. App., 483 S.W.2d 122 (1972).

A motion for discretionary review was filed with the Court of Appeals of Kentucky. Petitioner contended that the reading of the presumption was unconstitutional under the 14th Amendment of the U.S. Constitution and Section 11 of the Kentucky Constitution (Appendix Pages 3-5). In that motion for discretionary review the latest Supreme Court case, *Carella* v. *California,* 109 S.Ct. 2419 (1989) was cited in support for that proposition. In *Carella, supra,* the Court held that instructions given in the trial court that grand theft defendant should be presumed to have embezzled vehicle if it was not returned five days after the expiration of the rental agreement and that intent to commit

theft by fraud is presumed for failure to return property within twenty days of demand was unconstitutional since these mandatory presumptions foreclosed independent jury consideration of whether the facts presented establish certain elements of the offenses with which Carella was charged. *Francis* v. *Franklin, supra,* and *Sandstrom* v. *Montana, supra,* were again raised. The Court of Appeals of the Commonwealth of Kentucky in File No. 91-CA-443-D denied discretionary review (Appendix Page 32).

The Petitioner then filed a motion for discretionary review in the Supreme Court of the Commonwealth of Kentucky, File No. 91-SC-000392, to the Court of Appeals, File No. 91-CA-443-D. In this motion the only question raised was that the reading of the presumptions violated Petitioner's due process rights under the 14th Amendment of the United States Constitution and Section 11 of the Kentucky Constitution. The three federal Supreme Court cases, *Carella* v. *California, supra, Francis* v. *Franklin, supra, Sandstrom* v. *Montana, supra,* and *City of Seattle* v. *Gellein,* 768 P.2d 470 (Wash., 1989), were cited and relief demanded. The Supreme Court of Kentucky, on June 26, 1991, entered an order denying discretionary review (Appendix Page 38). This was a final order and the Petitioner has exhausted all the remedies available to him in the courts of the Commonwealth of Kentucky.

The instructions to the jury appear at Appendix Pages 39-40. There was no reference to the presumptions in the instructions. Instruction No. 2, the presumption of innocence instruction, stated

> The law presumes the defendant to be innocent of a crime and the arrest citation shall not be considered as evidence or having any weight against him.

This instruction in no way tends to water down the presumption that, if there is .10% or more by weight of alcohol in the blood, it shall be presumed that the defendant was under the influence of intoxicating beverages. The fact that the presumption was not read in the instructions in no way dilutes the presumption. Having been read by the Court from the Kentucky Revised Statutes (the law) as the last evidence introduced by the Commonwealth, the persuasive effect of this mandatory law would override any cautionary instruction given by the Court. Since it was read without being included with other instructions, the jury would be impressed by its importance and believe that they would have to find Tolen guilty since he had a reading in excess of .10. The Assistant County Attorney's remarks regarding the presumption only served to sway those jurors, if any, who had any doubt about the conclusiveness of the presumption.

A reading of the instructions given to the jury shows that the evidentiary presumptions constituted an unconstitutional mandatory presumption and shifted the burden of proof to Tolen. The Commonwealth was relieved of its burden of persuasion to prove beyond a reasonable doubt every essential element of the crime and violated the 14th Amendment of the U.S. Constitution.

REASON FOR GRANTING WRIT

This case is different from any of the other cases cited regarding presumptions. Normally, the presumption question arises from the final instructions read to a jury. This case involves a reading of the law from the Kentucky Revised Statutes as part of the proof of the Commonwealth. It is more persuasive and conducive to a jury regarding the presumption as mandatory than if it were included in the

numerous instructions given at the conclusion of the trial. The McCracken District Court, court of general jurisdiction in Kentucky, has decided a federal question which is contrary to the Supreme Court cases cited above. The McCracken Circuit Court was the appellate court rendering the decision and neither the Court of Appeals of Kentucky nor the Supreme Court of Kentucky saw fit to grant review of the federal question. The decision in this case confiicts with the due process clause of the 14th Amendment as enunciated by this Court in *Carella* v. *California, supra, Francis* v. *Franklin, supra,* and *Sandstrom* v. *Montana, supra.* The reading of presumptions as to intoxication while driving as a substitute or as expert opinion evidence as part of the Commonwealth's case violates the due process clause of the 14th Amendment.

There was a case styled *Mark Alan Morgan* v. *Fred Shirley, Barren County Jailer,* and *Frederic J. Cowan, Kentucky Attorney General,* No. C-88-0049-BG(M), which was decided by Judge Meredith of the U.S. District Court for the Western District of Kentucky which held that the reading of the presumption did not violate the due process clause of the 14th Amendment. This was a case in the Bowling Green Division of the Western District of Kentucky. It is now pending on appeal in the Court of Appeals for the 6th Circuit at Cincinnati, Ohio. It has been pending for quite some time and is the only case pending before a U.S. Circuit Court of Appeals known to the undersigned.

CONCLUSION

For the foregoing reasons this petition for a writ of cirtiorari to the McCracken Circuit Court of the Commonwealth of Kentucky should be granted.

Respectfully submitted,

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Counsel for Petitioner

September .., 1991

APPENDIX

McCRACKEN CIRCUIT COURT

DIVISION No. 11

Appeal No. 89-X-002

COMMONWEALTH OF KENTUCKY - - - - - *Appellee*

v.

WAYNE L. TOLEN - - - - - - *Appellant*

OPINION AND ORDER—Entered January 29, 1991

Wayne L. Tolen appeals from a jury verdict convicting him of driving under the influence and fining him $200.00. On appeal, Tolen makes four contentions. He argues that the breathalyzer reading should not have been introduced into evidence, that the Court erred in refusing his request for an instruction, that the integrity of the breathalyzer instrument was not established, and the Court erred in reading the presumptions under KRS 189.520 into evidence. The Court disagrees and affirms.

On November 25, 1987, Tolen stopped at a local bar and had several drinks. As Tolen proceeded home from the bar, his truck struck an automobile ahead of him stopped at a stop light. No damage was done to either vehicle. An off-duty officer stopped to investigate the accident. This officer had been following Tolen for approximately a mile and half and had noticed him weaving. He then administered field sobriety tests which Tolen did not pass. Tolen was administered a breathalyzer test which gave a reading of .17%. Tolen was then charged with driving under the influence and subsequently convicted of this offense by a jury.

Tolen's first contention of error is that the breathalyzer reading should not have been admitted into evidence. Tolen argues that because he wore dentures the breathalyzer test was invaild. He claims that because the dentures are foreign objects and were not removed, they failed to meet the basic requirements for the admission of this evidence set forth in *Markham* v. *Commonwealth,* Ky., 483 SW2d 122 (1972). The *Markham* case cannot be stretched to support Tolen's contention here. In *Markham,* the defendant, charged with driving under the influence, argued that the testimony with respect to the breathalyzer test did not show that it compiled with the basic requirements. The defendant cited a Washington case which held that the proof must show several things, including the requirement that the subject had nothing in his mouth at the time of the test and that he had taken no food or drink within fifteen minutes prior to taking the test. This was merely one of several elements to be proven. No reference is made to dentures being a foreign object in the mouth. While there was some testimony at trial concerning the effect of dentures, there was also other evidence that would indicate that dentures would have no effect whatsoever. In light of the conflicting testimony, it was for the jury to determine what credibility to give the breathalyzer test. Based upon Trooper Hamm's testimony, the jury was clearly reasonable in finding Tolen guilty.

Tolen next argues that the Court erred in refusing his request for an instruction for driving under the influence. His basic contention is that the jury must be instructed to find that he was driving under the influence of alcohol which *impaired* his ability to operate a motor vehicle. Instruction given merely required a finding that he was under the influence of alcohol while driving his automobile. This issue has been clearly determined by the Kentucky Court of Appeals in *Hayden v. Commonwealth,* Ky. App., 766

SW2d 956 (1989). In that case, the defendant was convicted for driving under the influence and appealed on the basis that a driving under the influence instruction requires elements such as those requested by Tolen. The Court specifically held in *Hayden* that evidence of impaired ability is not required for a driving under the influence conviction. The only thing the state must show is that the defendant was driving under the influence of alcohol. That was clearly present in Tolen's case. Specifically, the Court in *Hayden* wrote, "the statute would be redundant if read so as to require proof not only that the defendant was under the influence of alcohol, but also that alcohol impairs one's driving ability." *Id.* at 957. As a result, the instruction given by the trial court in this case was clearly sufficient under *Hayden*.

Tolen also argues that the integrity of the breathalyzer instrument was not established. He claims that the testimony indicated that the breathalyzer was kept in a cabinet in the foyer of the County Jail, and was not locked and was available to be tampered with. The Court is of the opinion that the breathalyzer instrument's integrity was clearly established. Trooper Bobby Hamm testified as to the workings of the breathalyzer and sufficiently established the breathalyzer's accuracy.

Finally, Tolen argues that the Court's reading of KRS 189.520(3)(a,b,c), was error because it violated the United States and Kentucky Constitutions. This statute relates to the presumptions regarding alcohol intoxication. These presumptions were read to the jury. The Kentucky Court of Appeals in *Markham v. Commonwealth*, Ky. App., 483 S.W.2d 122 (1972), held that the presumptions concerning blood-alcohol levels are admissible and upon appropriate motion, may be read by the trial judge to the jury as evidence. The Court specifically notes that this statute establishes and validates a scientific standard which otherwise

would require expert testimony and further notes that the principal object of the statute is to obviate the necessity of such testimony. Accordingly, the Court held that since it is, in that sense, a substitute for expert evidence on a scientific fact, the statute should be read in connection with the testimony concerning the blood-alcohol content. Thus, no error was made by the trial court in reading such presumptions.

For the foregoing reasons, the judgment of the District Court is affirmed.

ENTERED this 29th day of January, 1991.

HON. RON DANIELS, Judge
McCracken Circuit Court
Division No. II

Copies to: Commonwealth Attorney
Hon. E. W. Rivers
Hon. Fred Grimes, County Attorney
Hon. David R. Reed, District Judge

AOC- 79-950
Commonwealth of Kentucky
Court of Justice

CALENDAR

Date 12-2-88
Time Jury Trial

COURT JUDGE

Case No.	Style	Charges or Claim	Proceedings
87-T-2397 Review	Tolen, Wayne	DUI	Guilty 200 fine 12-9-88 Sentencing
88-T-2549	Holeman, Wm. Ralph	DUI	12-9-88 Review re. schedule jury date

RECEIVED
12/7/88

McCRACKEN DISTRICT COURT
NO. 87-T-2397
COMMONWEALTH V. WAYNE TOLEN

DATE: 12-2-88

Judge Signature

Date

BEST AVAILABLE COPY

COURT JU

Case No.	Style		Charges or Claim	Proceedings
89-M-198 BOND FEE DUE 1) 3402	CARNES, KENNETH RAY 8-3-48	C	ALCOHOL INTOX.	B|W
88-F-459 1) 2630 Flynn B/W(M.H.)	SORENSON, VIOLA VIRGIE CA-86F-113(C) 1-26-12	W	THEFT BY UNLAW. TAKING OVER $100 (AMD THEFT UNDER	B|W P.C. - B|W 67.50 - Contempt of Court Complied w/ M. H. Pd 67.50
89-T-418 1) 2955 (Orig. court date 3-3-89)	Powell, Victor C. 8-19-62		DUI No ops.	P.C. - 18 days - Credit + 150 fine + 77.50 Paid P.C. 10 days - Concurrent
THE FOLLOWING FOR CONTINUED FIRST APPEARANCE:				P.C.
89-M-155 1) 3415 BOND FEE DUE	LEWIS, GENEVA 7-29-55	C	THEFT BY UNLAW. TAKING UNDER $100	100 + 67.50 + 4 fee 3-2-89 Pay
1) 3510 Court date 2-14-89	Pool, Thomas J. 7415988		AI RA	P.C. 25 100 + 67.50 Paid 192.50
87-T-2798 1) 1546 Rivers Further Proceedings	McCoy, Phillip K.	C	DUI	250 + 150 + 77.50 SF Paid 477.50
THE FOLLOWING FOR REVIEW:				Mot. overruled for new trial
87-T-2397 V890 Rivers BOND FEE DUE	TOLEN, WAYNE L. 5-21-33	C	D.U.I.	Sent - $200 + 5th 150 + 67.50 + 4 fee 2-17-89 Pay on appeal
				McCRACKEN DISTRICT COURT NO. 87-T-2397 COMMONWEALTH V. WAYNE TOLEN

Judge Signature

Date February 2 1989

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McCRACKEN DISTRICT COURT

Case No. 87-T-2397

COMMONWEALTH OF KENTUCKY - - - - - *Plaintiff*

vs.

WAYNE L. TOLEN - - - - - - - - - *Defendant*

MOTION AND GROUNDS FOR NEW TRIAL AND FOR JUDGMENT N O V — Docketed December 9, 1988

The Defendant requests the Court to grant him a new trial for the following reasons:

1. The case of *Marcum v. Commonwealth,* 483 S.W.2d 122, established the guidelines for the admission of evidence as to the breathalyzer reading. The Court required at page 123(3):

> "that the subject had nothing in his mouth at the time of the test and that he had taken no food or drink within fifteen minutes prior to taking the test."

It was established that the Defendant had dentures, the lower with adhesive to serve as a cushion, and that he was not asked if he had dentures nor requested to remove them.

Officer Holt testfied that he had gone to Eastern University and was certified as an operator of the breathalyzer. It was his testimony that during the course the professors stated that suspects were to be asked if they had dentures and, if they did, to have them removed since it would affect the reading. Former Trooper Bobby Ham said, in his opinion, he did not believe it would affect the reading.

Under the authority of *Marcum*, supra, the breathalyzer reading should not have been admitted into evidence since the subject had something in his mouth-dentures. The Edmonson County District Court refused to permit the breathalyzer reading into evidence where the defendant was not told to remove dental work that might have affected the test result. A copy of the newspaper article out of *The Paducah Sun* is attached.

2. The Court refused to instruct, at the Defendant's request, "that while so doing he was under the influence of an intoxicating beverage or beverages *that impaired his ability to operate a motor vehicle*." The Court erred in refusing this part of the instruction. An article in *The Courier Journal* quotes the Administrator of the National Highway Traffic Safety Administration as stating that Kentucky requires proof that the intoxicating beverages caused impairment of the driver's ability to operate a motor vehicle. A copy of the December 3, 1988, edition is attached.

3. The integrity of the breathalyzer instrument was not established. Officeer Holt testified that the breathalyzer was in a cabinet in the foyer of the county jail. It was not locked and it was available and could be tampered with by anybody entering the foyer of the jail. The ampules which were used during the test were also in the cabinet and were available to anyone coming into the foyer of the jail. The Commonwealth has failed to prove that the breathalyzer was secure and that the instrument and the ampules had not been tampered with or substitutions made for the ampules.

4. It was error for the County Attorney to argue the presumptions as read by the Court from KRS 189.520(3,4). The *Marcum* case, *supra*, specifically provides at page 128:

> "After that testimony has been admitted, upon appropriate motion the trial judge may read or have read to the jury, as evidence, KRS 189.520(4) and (5) in their

entirety without further comment by the court with regard to the weight or effect of the evidence." (It now should read (3) and (4)).

The County Attorney in his closing argument relied on the presumptions in the statute and argued them vigorously before the jury. If the Court is not to comment any further on the presumptions, it is error for the County Attorney to comment on the weight to be given the presumptions by the jury.

The County Attorney's argument affected the substantial rights of this Defendant to a fair trial and the other errors set forth above prevented the Defendant from having a fair trial and the Defendant should be granted a new trial. In the alternative, the Court should enter a judgment of acquital notwithstanding the verdict since, if the breathalyzer reading had not been erroneously admitted into evidence, there would have been insufficient evidence to submit the action to the jury.

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McCRACKEN DISTRICT COURT

Case No. 87-T-2397

COMMONWEALTH OF KENTUCKY - - - *Plaintiff*

v.

WAYNE L. TOLEN - - - - - - *Defendant*

MEMORANDUM IN SUPPORT OF MOTION AND GROUNDS FOR NEW TRIAL—Docketed Feb. 2, 1989

Over objection of the Defendant, the Court, at the request of the Commonwealth, read KRS 189.520(3, a, b, c) to the jury. Part (3)(c) of the statute which was read to the jury reads as follows:

> "If there was 0.10 percent (1/10%) or more by weight of alcohol in such blood, it shall be presumed that the defendant was under the influence of intoxicating beverages."

Subsection (c) created a mandatory presumption whereby the jury must find that Tolen was driving the automobile under the influence of intoxicating beverages and was, therefore, guilty.

Two cases have been rendered by the Supreme Court of the United States which hold that such a mandatory presumption is unconstitutional as violating the due process clause of the 14th Amendment of the Federal Constitution.

In the case of *Sandstrom v. Montana,* 99 S.Ct. 2450 (1979), the instruction given to the jury read:

> "The law presumes that a person intends the ordinary consequences of his voluntary acts."

The Supreme Court of Montana had found that the instruction was constitutional. The Supreme Court held that, while the Montana court was the final authority on the legal weight given to the presumption, it was not the final authority on the interpretation which a jury could have given the instruction. The Court specifically held that the instruction was unconstitutional in that it conflicted with the presumption of innocence accorded a defendant, and further that the burden of proof was shifted to the defendant to prove that he lacked the requisite mental state. The 14th Amendment requires that the state prove every element of a criminal offense beyond a reasonable doubt. The instruction was contrary to that requirement and, therefore, unconstitutional. The case was reversed.

The latest case is *Francis v. Franklin*, 105 S.Ct. 1965 (1985). In that case the trial judge instructed the jury as follows:

> "The acts of a person of sound mind and discretion are presumed to be the product of the person's will, but the presumption may be rebutted. A person of sound mind and discretion is presumed to intend the natural and probable consequences of his acts but the presumption may be rebutted. A person will not be presumed to act with criminal intention but the trier of facts . . . may find criminal intention upon a consideration of the words, conduct, demeanor, motive and all of the circumstances connected with the act for which the accused is prosecuted."

The jury was also given the presumption of innocence instruction wherein the state was required to prove every element of the offense beyond a reasonable doubt. Defendant was found guilty. The Federal Court of Appeals reversed the state's decision holding that the jury charge on intent could have been interpreted by a reasonable juror

as a mandatory presumption that shifted the burden of presuasion to the defendant on the intent element of the offense and, therefore, violated the 14th Amendment due process guarantees of the Federal Constitution. The Supreme Court held that the case must be reversed since the instruction violated the 14th Amendment due process clause.

The McCracken District Court did give instructions at the conclusion of the trial which did not refer to KRS 189. 520 (3, 4). Nevertheless, the statute creating the mandatory presumption was made to the jury at the conclusion of the Commonwealth's case. The statute mandated that the jury find that the defendant was under the influence of intoxicating beverages and, therefore, guilty of driving under the influence. The fact that the statute was read to the jury rather than being part of the instructions is of no consequence. The finding of Defendant Tolen guilty violates the due process clause of the 14th Amendment of the Constitution of the United States and the verdict must be set aside.

E. W. Rivers
603 Citizens Bank Building
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(502) 443-3333
Attorney For Defendant

CERTIFICATE OF SERVICE

I certify that the foregoing Memorandum was hand-delivered to Hon. Fred Grimes, McCracken County Attorney, on this 2nd day of February, 1989.

E. W. RIVERS

COMMONWEALTH OF KENTUCKY

McCRACKEN DISTRICT COURT

Case No. 87-T-2397

COMMONWEALTH OF KENTUCKY - - *Plaintiff Appellee*

v.

WAYNE L. TOLEN - - - *Defendant Appellant*

STATEMENT OF APPEAL—Docketed March 10, 1989

A. The Appellant is Wayne L. Tolen, and the Appellee is the Commonwealth of Kentucky.

B. The name and address of counsel for Appellant is E. W. Rivers, 603 Citizens Bank Building, Paducah, Kentucky 42001; the name and address of counsel for Appellee is Fred Grimes, County Attorney, Courthouse, Paducah, Kentucky 42001.

C. The trial judge is Hon. David Reed, Courthouse, Paducah, Kentucky 42001.

D. Judgment was entered on February 2, 1989, and can be found on the calendar for February 2, 1988, of the District Court.

E. The notice of appeal was filed on February 10, 1989.

F. The Appellant is free on bond.

G. The Appellant wants an oral argument.

H. Summary of Evidence.

Wayne Tolen, the Defendant, is the owner of Tolen Marine, Inc., and is engaged in river traffic. The company operates quite a few motor vehicles and employs some 48 people.

On August 25, 1987, Tolen had been down to the Ohio River to check on a towboat that was in for repairs. He left the boat and went to Jeremiah's at 3rd and Broadway. This was about 7:00 p.m. He had three or four drinks, but most certainly not over four. He was drinking VO and water which is 86 proof whiskey. He was driving a 1977 pickup truck. Tolen left Jeremiah's and drove to 28th Street, then turned and stopped at Taco John's on Jackson. He proceeded to negotiate through the parking lot and got sandwiches to take home that night for dinner. He paid the correct amount and left Taco John's and went about two blocks and turned left on Lone Oak Road. He proceeded out Lone Oak Road and stopped at the stoplight just prior to going under the I-24 overpass. There was a car stopped in front of him and, after Tolen stopped his automobile, his truck eased into and struck the automobile ahead of him. He does not know whether he let up on the brake or because of age the truck brakes released and bumped the automobile ahead. Tolen got out and the driver of the car got out and there was no damage. It was then Officer Carter stopped. He had just gotten off duty and had been following Tolen from Hannan Plaza to the stoplight which is approximately a mile to a mile and a half. He had noticed Tolen weaving but made no attempt to stop him until he saw Tolen's truck bump the car ahead at the red light. He had Tolen perform a couple of sobriety tests and was of the opinion that Tolen did not pass the tests. He told the driver of the car that was bumped to call the police department and send another officer which they did. Officer Holt arrived and took Tolen to the county jail where he administered the breathalyzer test and had a reading of .17. The officer said he had no trouble whatever with Tolen and Tolen remained in the county jal without being locked up. He called Joe Viterisi who came down and picked him up in about 30 to 35 minutes and took him

home. Viterisi testified that, as far as he was concerned in his observation of Tolen, he was not intoxicated nor did he notice any action by Tolen that revealed any degree of intoxication. The jury found Tolen guilty and fined him $200.00.

I.

The Breathalyzer Reading Should Not Have Been Admitted Into Evidence.

Officer Holt who gave the breathalyzer test to Tolen testified that he could not remember whether he asked Tolen if he wore dentures. He said it was the normal procedure to ask but he could not recall. He said if they do have dentures he asked them to remove them. He took the breathalyzer course at Eastern State University. He said the professors there told them to ask each person before testing if they had dentures and, if they did, to have them removed since it would affect the results. Tolen did have dentures, both upper and lower, and the lower plate had a cushion in the plate which rested on the gums. Tolen was never asked if he had dentures and, consequently, did not remove his dentures.

The basic requirements for the admission of this evidence are set forth in *Marcum* v. *Commonwealth,* 483 S.W. 2d 122 (1972). The Court, in that case quoting from a Washington state case, stated that one of the requirements was at page 123.

> "(3) that the subject had nothing in his mouth at the time of the test and that he had taken no food or drink within fifteen minutes prior to taking the test."

The dentures are a foreign object and should have been removed and the test was therefore invalid since it did not meet the requirements set forth in *Marcum, supra.*

Ne recorded cases in Kentucky have been found by the undersigned. However, the Edmonson County District Court in December of 1988 refused to permit the breathalyzer reading into evidence where the defendant was not told to remove his dental work. (Attached newspaper).

The Defendant objected to the introduction into evidence of the breathalyzer reading and it should have been excluded.

II.

The Court Erred In Refusing Defendant's Request For An Instruction.

The Court gave the instructions set forth in Palmore. Instruction I(a) and (b) read as follows:

> "(a) That in this County on or about the 25th day of August, 1987, and within twelve (12) months before the issuance of the arrest citation herein, he was driving a 1977 Chevrolet Pick-up truck, at Lone Oak Road and Interstate 24;
>
> "AND
>
> "(b) That while so doing he was under the influence of an intoxicating beverage or beverages."

The Defendant requested that the instruction be given as follows:

> "(b) That whlie so doing he was under the influence of an intoxicating beverage or beverages that impaired his ability to operate a motor vehicle."

The Court refused this part of the instruction.
KRS 189.520 provides:

> "(1) No person under the influence of intoxicating beverages or any substance which may impair one's driv-

ing ability shall operate a vehicle that is not a motor vehicle anywhere in this state."

This statute requires that the jury must find that Tolen's ability to drive his truck was impaired before finding him quilty.

An article in *The Courier Journal* quotes the Administrator of the National Highway Traffic Safety Administration as stating that Kentucky requires proof that the intoxicating beverages caused impairment of the driver's ability to operate a motor vehicle. A copy of the December 3, 1988, edition is attached. The Court committed prejudicial error in not giveng the requested instruction.

III.

The Integrity Of The Breathalyzer Instrument Was Not Established.

The integrity of the breathalyzer instrument was not established. Officer Holt testified that the breathalyzer was in a cabinet in the foyer of the county jail. It was not locked and it was available and could be tampered with by anybody entering the foyer of the jail. The ampules which were used during the test were also in the cabinet and were available to anyone coming into the foyer of the jail. The Commonwealth has failed to prove that the breathalyzer was secure and that the instrument and the ampules had not been tampered with or substitutions made for the ampules. The breathalyzer reading should not have been admitted into evidence.

IV.

The Court's Reading Of KRS 189.520(3)(a, b, c) Was Error Since It Violated The U.S. And Kentucky Constitution.

Over objection of the Defendant, the Court, at the request of the Commonwealth, read KRS 189.520(3)(a, b, c) to the jury. Part (3)(c) of the statute which was read to the jury reads as follows:

> "If there was 0.10 percent (1/10%) or more by weight of alcohol in such blood, it shall be presumed that the defendant was under the influence of intoxicating beverages."

Subsection (c) created mandatory presumption whereby the jury must find that Tolen was driving the automobile under the influence of intoxicating beverages and was, therefore, guilty.

The Court, in response to the Defendant's objections, said:

> "The statute says that I must do them, Mr. Rivers."

The case of *Marcum* v. *Commonwealth,* Ky., 483 S.W.2d 122 (1972), at page 128, was where the Court first gave its *mixed blessing* on reading that provision of the statute to the jury.

In that case Marcum contended that the provision in KRS 189.520(4)(c) which is now (3)(c) was unconstitutional in that it created a presumption of guilt in conflict with the presumption of innocence granted to all accused of crime. The Appellate Court said that this argument was rejected in *Shumate* v. *Commonwealth,* 207 Va. 877, 153 S.E. 243 (1967) (p. 124), and adopted the ruling in *Shumate, supra.*

However, the circuit court had given an instruction on this phase of the statute and instructed the jury:

> "that if Marcum had .10 percent or more by weight of alcohol in the blood of the body of Marcum then it shall be presumed that Marcum was under the influence of intoxicating beverages at that time; povided, however, that such *presumption can be overcome by the evidence.*" (underscoring ours).

The Appellate Court in this case did not find and evidently rejected the argument that the instruction given was in conflict with the presumption of innocence granted to all persons accused of crime. The Appellate Court had previously held in the case of *Botnick* v. *Commonwealth,* 266 Ky. 419, 99 S.W.2d 188 (1936), that the giving of an instruction that possession of any stolen goods by defendant should be of itself prima facie evidence of guilt was improper even though the statute dictated the possession would be prima facie evidence of guilt. In the *Botnick* case, *supra,* the Court had various instructions to the jury creating presumptions were improper for the following reasons:

1. Never been deemed proper in this state to instruct on the weight of the evidence,
2. Or to call attention to any particular fact and indicate is importance,
3. Or to single out specific facts or groups of facts and give them undue importance.

The above are reasons given for the instructions being improper at page 126 of the *Marcum* opinion.

The Court goes on and states that other courts take the position that inasmuch as the inference to be drawn from the evidence is strictly a matter for the jury, the trial court should not instruct on the question.

In the case of *Mabe* v. *Commonwealth,* 279 Ky. 432, 130 S.W.2d 805 (1939), the jury was told that the holding of a federal license to sell alcoholic beverages without a license from the state shall in all cases raise a prima facie presumption that the holder of the federal permit is trafficking in alcoholic beverages. The judgment of conviction was reversed for the same reasons set forth in *Botnick, supra.*

The Appellate Court, at page 127, likewise held that the presumption instruction given in *Marcum* was improper and that the Court continues to adhere to the principles announced in *Botnick* v. *Commonwealth, supra,* and *Mabe* v. *Commonwealth, supra* (p. 127).

It is apparent from the reading of the *Marcum* case that the Kentucky Court of Appeals never did find or consider the instruction given as being unconstitutional or being in conflict with the presumption of innocence provision of the Constitution or shifting of the burden of proof to the defendant and relieving the Commonwealth of proving the essential facts of guilt.

The Supreme Court of the United States in 1979 and 1985 has considered instructions setting forth presumptions. In the case of *Sandstrom* v. *Montana,* 99 S.Ct. 2450 (1979), the instruction given to the jury read:

> "The law presumes that a person intends the ordinary consequences of his voluntary acts."

The Supreme Court of Montana had found that the instruction was constitutional. The U.S. Supreme Court held that, while the Montana court was the final authority on the legal weight given to the pesumption, it was not the final authority on the interpretation which a jury could have given the instruction. The Court specifically held that the instruction was unconstitutional in that it conflicted with the presumption of innocence accorded a defendant, and further that the burden of proof was shifted

to the defendant to prove that he lacked the requisite mental state. The 14th Amendment requires that the state prove every element of a criminal offense beyond a reasonable doubt. The instruction was contrary to that requirement and, therefore, unconstitutional. The case was reversed.

The latest case is *Francis* v. *Franklin,* 105 S.Ct. 1965 (1985). In that case the trial judge instructed the jury as follows:

> "The acts of a person of sound mind and discretion are presumed to be the product of the person's will, but the presumption may be rebutted. A person of sound mind and discretion is presumed to intend the natural and probable consequences of his acts but the presumption may be rebutted. A person will not be presumed to act with criminal intention upon a consideration of the words, conduct, demeanor, motive and all of the circumstances connected with the act for which the accused is prosecuted."

The jury was also given the presumption of innocence instruction wherein the state was required to prove every element of the offense beyond a reasonable doubt. Defendant was found guilty. The Federal Court of Appeals reversed the state's decision holding that the jury charge on intent could have been interpreted by a reasonable juror as mandatory presumption that shifted the burden of persuasion to the defendant on the intent element of the offense and, therefore, violated the 14th Amendment due process guarantees of the Federal Constitution. The Supreme Court held that the case must be reversed since the instruction violated the 14th Amendment due process clause.

CONCLUSION

The Defendant requests the Court to grant the following relief:

1. That the reading of KRS 189.520(3)(c) violates the 14th Amendment of the U.S. Constitution and Section 11 of the Bill of Rights of Kentucky;

2. That the breathalyzer reading should not have been admitted into evidence since the Defendant's dentures were not removed prior to taking of the test which was required in *Marcum* v. *Commonwealth, supra,* and the Commonwealth failed to prove the integrity of the breathalyzer instrument and the ampules;

3. That the Court committed prejudicial error when it refused to give the instruction requested by the Defendant;

4. That the Court set aside the judgment of conviction and order the Dsitrict Court to grant the Defendant a new trial.

(s) E. W. Rivers
E. W. Rivers
603 Citizens Bank Building
Paducah, Kentucky 42001
(502) 443-3333

Attorney for Defendant/Appellant

CERTIFICATE OF SERVICE

I hereby certify that the foregoing Statement of Appeal was served on parties hereto by mailing a copy thereof to Hon. Fred Grimes, McCracken County Attorney, Courthouse, Paducah, KY 42001; to Hon. Mark Bryant, Commonwealth's Attorney, Courthouse, Paducah, KY 42001; and to Hon. Fred Cowan, Attorney General, 116 Capitol Bldg., Frankfort, KY 40601, on this 10th day of March, 1989.

(s) E. W. Rivers
E. W. Rivers

IN THE

COURT OF APPEALS

FOR THE COMMONWEALTH OF KENTUCKY

Appeal No. 91-CA-443-D

WAYNE L. TOLEN - - - - - - - *Movant*

v.

COMMONWEALTH OF KENTUCKY - - - *Respondent*

MOTION FOR DISCRETIONARY REVIEW

Docketed February 27, 1991

(a) The name of the Movant is Wayne L. Tolen. Movant's attorney is E. W. Rivers, Suite 161, Katterjohn Building, 1501 Broadway, Paducah, KY 42001. The name of the Respondent is the Commonwealth of Kentucky, whose attorneys are Frederic J. Cowan, Jr., Attorney General, State Capitol, Frankfort, KY 40601-3493, and Fred H. Grimes, McCracken County Attorney, McCracken County Courthouse, Paducah, KY 42001.

(b) The opinion and order of the McCracken Circuit Court (an appellate court) affirming the judgment of Conviction was entered on January 29, 1991.

(c) The Movant is presently on bail.

(d)(i) MATERIAL FACTS

Movant Wayne Tolen was a 55 year old male and owner and operator of Tolen Marine, Inc. On August 25, 1987, Defendant was going home from work about 7:00 p.m. He had three or four drinks and had been drinking VO which

is 86 proof whiskey. He was driving a pickup truck and stopped at Taco John's and picked up dinner for his wife and himself. He stopped on the Lone Oak Road at the stoplight prior to going under the I-24 underpass. A car was stopped in front of him and his truck eased into and bumped the automobile ahead. There was no damage. Officer Carter, who had been proceeding in the same direction and following Tolen, stopped since he saw Tolen's truck bump the car ahead. He smelled alcohol, had Tolen perform a couple of sobriety tests and was of the opinion Tolen did not pass the tests. Officer Carter told the driver of the car which was bumped to go on and call the Paducah Police Department and have them send another officer out to pick up Tolen. Another Paducah Police officer, Holt, arrived and took Tolen to the county jail and Officer Carter proceeded on home. A breathalyzer test on the old Smith and Wesson 900 registered Tolen as having a reading of .17. Tolen at the time was wearing dentures, uppers and lowers, with a cushion on the lower denture and was not asked by the officer to remove the dentures. At the trial of the case, the county attorney requested the Court to read the presumptions in KRS 189.520(3) (a, b, c). The Defendant objected to the reading of the presumptions to the jury since it would be prejudicial, unconstitutional and would prevent the Defendant from having a fair trial. The Court read the presumption but did not read subsection 4. The jury, after instructions were given to them, found the Defendant guilty of DUI and fined him $200.

(ii) QUESTIONS OF LAW INVOLVED

1. The reading of KRS 189.520(3)(a, b, c) violated Tolen's due process rights under the 14th Amendment of the United States Constitution and Section 11 of the Kentucky Constitution.

Subsection 3(c) of the statute which was read to the jury reads as follows:

> If there was 0.10 percent (1/10%) or more by weight of alcohol in such blood, it shall be presumed that the defendant was under the influence of intoxicating beverages.

While this was not an instruction, it was read to the jury by the judge at the conclusion of the Commonwealth's evidence and had the same effect as the instructions given to the jury at the conclusion of the evidence. The Supreme Court of the United States in *Carella* v. *California,* 109 S.Ct. 2419 (1989), held that the instructions given in the trial court that granted theft defendant should be presumed to have embezzled vehicle if it was not returned five days after the expiration of a rental agreement, and that intent to commit theft by fraud is presumed for failure to return rental property within twenty days of demand were unconstitutional. The Court held that these were mandatory presumptions which directly foreclosed independent jury consideration of whether the facts presented established certain elements of the offenses with which Carella was charged. The Due Process Clause of the 14th Amendment denies states the power to deprive the accused of liberty unless the prosecution proves beyond a reasonable doubt every element of the charged offense. Where jury instructions relieve the states of this burden, they violate a defendant's due process rights. Such directions subvert the presumption of innocence accorded to accused persons and invade the truth-finding task assigned solely to juries in criminal cases. *Francis* v. *Franklin,* 471 U.S. 307, 105 S.Ct. 1965, 85 L.Ed.2d 344 (1985); *Sandstrom* v. *Montana,* 442 U.S. 510, 99 S.Ct. 2450, 61 L.Ed.2d 39 (1979); *City of Seattle* v. *Gellein,* 768 P.2d 470 (Wash., 1989)

In the *Sandstrom* case, *supra,* the jury in a murder case was instructed that "the law presumes that a person intends the ordinary consequences of his voluntary acts." The Supreme Court held that, because a jury might have understood the presumption to be conclusive whereas shifting the burden of persuasion, the instruction was unconstitutional error.

The reading of KRS 189.520(3)(c) was a conclusive presumption from the .17 that the Defendant was under the influence of intoxicating beverages and the jurors might have understood the presumption to be conclusive. Tolen admitted driving the truck on Lone Oak Road but denied he was intoxicated. The only fact to be found by the jury under the instructions was whether Tolen was under the influence of intoxicating beverages while he was operating his truck. The jury would remember that, since he had over a .10 breathalyzer reading, he was automatically under the influence of intoxicating beverages. There was no other evidence for them to consider. The opinion and order of the McCracken Circuit Court should be vacated because of this constitutional error.

2. The breathalyzer reading should not have been admitted into evidence.

Officer Holt, who gave the breathalyzer test on the Smith and Wesson 900, testified he could not remember whether he had asked Tolen if he wore dentures. He said it was normal procedure to ask this question and, if they have dentures, ask them the remove them. Holt took the breathalyzer course at Eastern State University and he testified the professors there told him to ask each person before tests if they had dentures and, if they did, to have them removed since it would affect the results. Tolen testified that he had dentures, both upper and lower, and the lower plate had a cushion in the plate which rested on the gums. Tolen was never asked if he had dentures and they were

not removed during the test. The basic requirements for the admissions of the breathalyzer test are set forth in *Marcum* v. *Commonwealth,* 483 S.W.2d 122 (1972). The Court in that case, quoting from a Washington case, stated, at page 123, that one of the requirements was:

> (3) that the subject had nothing in his mouth at the time of the test and that he had taken no food or drink within fifteen minutes prior to taking the test.

The dentures are a foreign object and should have been removed since the test was made in violation of the standards established by this Court and at Eastern State University which trains police officers in the use of the breathalyzer. The breathalyzer reading from the Smith and Wesson 900 breathalyzer should not have been admitted into evidence.

(iii) REASONS WHY JUDGMENT SHOULD BE REVIEWED

Since the question involves a constitutional issue, it is a public question which should be resolved by this Court. A case similar to the facts in the case now before the Court was decided by Judge Meredith at U.S. District Court at Bowling Green. Judge Meredith held that the reading of KRS 189.520 was not a violation of the 14th Amendment. The case is styled *Mark Alan Morgan* v. *Fred Shirley, Barren County Jailer, and Frederick J. Cowan, Kentucky Attorney General,* No. C-88-0049-BG(M), and is now pending on appeal in the Sixth Circuit.

This issue should be decided in view of all the public outcry regarding the DUI Law.

Since the Legislature has enacted a very strict DUI law this month, the issue as to whether dentures should or should not be removed before testing needs to be resolved.

(e) N/A.

(f) No other party to this proceeding has filed a petition for rehearing or has a motion for reconsideration pending in the Court of Appeals.

(s) E. W. Rivers
E. W. Rivers
Suite 161, Katterjohn Bldg.
1501 Broadway
Paducah, Kentucky 42001
(502) 443-3333

Attorney for Movant

CERTIFICATE OF SERVICE

I hereby certify that the foregoing Motion for Discretionary Review was served on all parties hereto by mailing copies thereof to: Hon. Frederick J. Cowan, Attorney General, State Capitol, Frankfort, KY 40601-3493; Hon. Fred T. Grimes, McCracken County Attorney, McCracken County Courthouse, 301 South Sixth Street, Paducah, KY 42001; and Mr. Alfred Obermark, McCracken Circuit Court Clerk, McCracken County Courthouse, 301 South Sixth Street, Paducah, KY 42001, on this 26th day of February, 1991.

(s) E. W. Rivers
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(502) 443-3333

COMMONWEALTH OF KENTUCKY

COURT OF APPEALS

91-CA-443-D

WAYNE L. TOLEN - - - - - - - *Movant*

v.

COMMONWEALTH OF KENTUCKY - - - *Respondent*

On Motion for Discretionary Review
From McCracken Circuit Court
Action No. 89-X-2

ORDER DENYING DISCRETIONARY REVIEW

BEFORE: LESTER, CHIEF JUDGE; MILLER and MCDONALD, JUDGES

Having considered movant's motion for discretionary review, to which no response was filed, and being otherwise sufficiently advised, the Court ORDERS the motion be, and it is hereby, DENIED.

ENTERED: April 8, 1991

(s) JOHN D. MILLER
JUDGE, COURT OF APPEALS

COMMONWEALTH OF KENTUCKY

SUPREME COURT

File No. 91-SC-000392

WAYNE L. TOLEN - - - - - - - *Movant*

v.

COMMONWEALTH OF KENTUCKY - - - *Respondent*

MOTION FOR DISCRETIONARY REVIEW
FROM COURT OF APPEALS
FILE No. 91-CA-443-D

(a) The name of the Movant is Wayne L. Tolen. Movant's attorney is E. W. Rivers, Suite 161, Katterjohn Building, 1501 Broadway, Paducah, KY 42001. The name of the Respondent is the Commonwealth of Kentucky, whose attorneys are Frederic J. Cowan, Jr., Attorney General, State Capitol, Frankfort, KY 40601-3493, and Fred H. Grimes, McCracken County Attorney, McCracken County Courthouse, Paducah, KY 42001.

(b) The opinion and order of the McCracken Circuit Court (an appellate court) affirming the judgment of conviction was entered on January 29, 1991. The motion for discretionary review to the Court of Appeals of Kentucky was denied on April 8, 1991, and a copy is attached.

(c) The Movant is presently on bail.

(d)(i) *MATERIAL FACTS*

Movant Wayne Tolen was a 55 year old male and owner and operator of Tolen Marine, Inc. On August 25, 1987, Defendant was going home from work about 7:00 p.m. He

had three or four drinks and had been drinking VO which is 86 proof whiskey. He was driving a pickup truck and stopped at Taco John's and picked up dinner for his wife and himself. He stopped on the Lone Oak Road at the stoplight prior to going under the I-24 underpass. A car was stopped in front of him and his truck eased into and bumped the automobile ahead. There was no damage. Officer Carter, who had been proceeding in the same direction and following Tolen, stopped since he saw Tolen's truck bump Carter, who had been proceeding in the same direction and the car ahead. He smelled alcohol, had Tolen perform a couple of sobriety tests and was of the opinion Tolen did not pass the tests. Officer Carter told the driver of the car which was bumped to go and call the Paducah Police Department and have them send another officer out to pick up Tolen. Another Paducah Police Officer, Holt, arrived and took Tolen to the county jail and Officer Carter proceeded on home. A breathalyzer test on the old Smith and Wesson 900 registered Tolen as having a reading of .17. Tolen at the time was wearing dentures, upper and lowers, with a cushion on the lower denture and was not asked by the officer to remove the dentures. At the trial of the case, the county attorney requested the Court to read the presumptions in KRS 189.520(3)(a, b, c). The Defendant objected to the reading of the presumptions to the jury since it would be prejudicial, unconstitutional and would prevent the Defendant from having a fair trial. The Court read the presumptions but did not read subsection 4. The jury, after instructions were given to them, found the Defendant guilty of DUI and fined him $200.

(ii) QUESTION OF LAW INVOLVED

1. The reading of KRS 189.520(3)(a, b, c) violated Tolen's due process rights under the 14th Amendment of

the United States Constitution and Section 11 of the Kentucky Constitution.

Subsection 3(c) of the statute which was read to the jury reads as follows:

> If there was 0.10 percent (1/10%) ore more by weight of alcohol in such blood, it shall be presumed that the defendant was under the influence of intoxicating beverages.

While this was not an instruction, it was read to the jury by the judge at the conclusion of the Commonwealth's evidence and had the same effect as the instructions given to the jury at the conclusion of the evidence. The Supreme Court of the United States in *Carella* v. *California,* 109 S.Ct. 2419 (1989), held that the instructions given in the trial court that grand theft defendant should be presumed to have embezzled vehicle if it was not returned five days after the expiration of a rental agreement, and that intent to commit theft by fraud is presumed for failure to return rental property within twenty days of demand were unconstitutional. The Court held that these were mandatory presumptions which directly foreclosed independent jury consideration of whether the facts presented established certain elements of the offenses with which Carella was charged. The Due Process Clause of the 14th Amendment denies states the power to deprive the accused of liberty unless the prosecution proves beyond a reasonable doubt every element of the charged offense. Where jury instructions relieve the states of this burden, they violate a defendant's due process rights. Such directions subvert the presumption of innocence accorded to accused persons and invade the truth-finding task assigned solely to juries in criminal cases. *Francis* v. *Franklin,* 471 U.S. 307, 105 S.Ct. 1965, 85 L.Ed.2d 344 (1985); *Sandstrom* v. *Montana,* 442

U.S. 510, 99 S.Ct. 2450, 61 L.Ed.2d 39 (1979); *City of Seattle* v. *Gellein,* 768 P.2d 470 (Wash., 1989)

In the *Sandstrom* case, *supra,* the jury in a murder case was instructed that "the law presumes that a person intends the ordinary consequences of his voluntary acts." The Supreme Court held that, because a jury might have understood the presumption to be conclusive whereas shifting the burden of persuasion, the instruction was constitutional error.

The reading of KRS 189.520(3)(c) was a conclusive presumption from the .17 that the Defendant was under the influence of intoxicating beverages and the jurors might have understood the presumption to be conclusive. Tolen admitted driving the truck on Lone Oak Road but denied that he was intoxicated. The only fact to be found by the jury under the instructions was whether Tolen was under the influence of intoxicating beverages while he was operating his truck. The jury would remember that, since he had over a .10 breathalyzer reading, he was automatically under the influence of intoxicating beverages. There was no other evidence for them to consider. The Court should grant discretionary review because of the constitutional error committed by the lower court.

(iii) REASONS WHY JUDGMENT SHOULD BE REVIEWED

Since the question involves a constitutional issue, it is a public question which should be resolved by this Court. A case similar to the facts in the case now before this Court was decided by Judge Meredith at U.S. District Court at Bowling Green. Judge Meredith held that the reading of KRS 189.520 was not a violation of the 14th Amendment. The case is styled *Mark Alan Morgan* v. *Fred Shirley, Barren County Jailer, and Frederick J. Cowan, Kentucky At-*

torney General, No. C-88-0049-BG(M), and is now pending on appeal in the Sixth Circuit.

The Court should decide the issues in this case in view of the United States Supreme Court's holdings in the above cited cases.

(e) The Movant does not have a petition for rehearing or motion for reconsideration pending in the Court of Appeals.

(f) No other party to this proceeding has filed a petition for rehearing or has a motion for reconsideration pending in the Court of Appeals.

(s) E. W. Rivers
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Attorney for Movant

Docketed April 25, 1991

SUPREME COURT OF KENTUCKY

91-SC-392-D
(91-CA-443-D)

WAYNE L. TOLEN - - - - - - - *Movant*

v.

COMMONWEALTH OF KENTUCKY - - - *Respondent*

ORDER DENYING DISCRETIONARY REVIEW

The motion for review of the decision of the Court of Appeals is denied.

ENTERED June 26, 1991.

(s) Robert F. Stephens
Robert F. Stephens
Chief Justice

McCRACKEN DISTRICT COURT

Case No. 87-T-2397

COMMONWEALTH OF KENTUCKY - - - *Plaintiff*

v.

WAYNE L. TOLEN - - - - - - *Defendant*

INSTRUCTIONS TO JURY

INSTRUCTION NO. I: OPERATING A MOTOR VEHICLE WHILE UNDER THE INFLUENCE

You will find the Defendant guilty if, and only if, you believe from the evidence beyond a reasonable doubt all of the following:

(a) That in this County on or about the 25th day of August, 1987, and within twelve (12) months before the issuance of the arrest citation herein, he was driving a 1977 Chevrolet Pick-up truck, at Lone Oak Road and Interstate 24;

AND

(b) That while so doing he was under the influence of an intoxicating beverage or beverages.

If you find the Defendant guilty under Instruction No. I, you will fix his punishment at a fine of not less than $200.00, nor more than $500.00, in your discretion, or confinement in the District Jail for not less than 48 hours, nor more than 30 days, or at both confinement and fine, in your discretion.

INSTRUCTION No. II: PRESUMPTION OF INNOCENCE

The law presumes a Defendant to be innocent of a crime, and the arrest citation shall not be considered as evidence or as having any weight against him. You shall find the Defendant not guilty unless you are satisfied from the evidence alone, and beyond a reasonable doubt, that he is guilty. If upon the whole case you have a reasonable doubt that he is guilty, you shall find him not guilty.

INSTRUCTION No. III: UNANIMOUS VERDICT

You are further instructed that your verdict must be unanimous. You will elect one of your members as foreman, and the foreman will sign the verdict. You may use one of the forms provided at the end of these instructions.

DATED this the 2nd day of December, 1988.

Judge—McCracken District Court

McCRACKEN DISTRICT COURT

No. 87-T-2397

COMMONWEALTH *v.* WAYNE TOLEN

TRANSCRIPT OF TAPE

Holt: In the machine, there's actually two ampules, we have a control ampule, then one we actually use that the test is performed on, we throw that one away, yes, sir.

Rivers: You throw the test away?

Holt: Yes, sir.

Rivers: Now, did you at any time ask Mr. Tolen whether he had dentures?

Holt: That's the normal procedure but I can't swear that I did ask Mr. Tolen, I just don't recall.

Rivers: Well, if they have them, do you ask them to take the dentures out?

Holt: Yes, sir.

Rivers: And that's because it might affect it in some way?

Holt: That's what I've been told, yes. I don't know that, it's what I've been told.

Rivers: That's what you were told at Eastern University?

Holt: Yes, sir.

Rivers: I believe that's . . . I believe that's all I have, Your Honor.

Judge: Any redirect?

Hines: No, sir.

Judge: You may step down.

Hines: I'm not concluded yet.

Clerk: Oh, you're not?

Hines: No, I'm going to get the presumptions read. If you want to leave it there, it's just for the Judge, it's not another witness. I've generally, I think we've done it several ways, and I think we've come to the conclusion that if you want to do it at a later time, that's fine, but I think since, you know, the burden of proof is _____, present it now. So that's what I'm asking for . . . . unable to hear conversation)

Rivers: Show my objections to the instructions (unable to hear conversation)

Judge: The statute says that I must do them . . . Mr. Rivers, I normally read Sections A, B and C, of Subsection 3, which you can request that the whole statute be read.

Rivers: No, those will be fine.

Judge: Ladies and gentlemen of the jury, I will read to you a portion of the Kentucky Revised Statutes. This is what we call KRS 189.520, Subsection 3, and there are three subsections of that, A, B and C. A: If there was a .05 percent, five one-hundredths percent or less by weight of alcohol in such blood, it shall be presumed that the defendant was not under the influence of intoxicating beverages. Sub B: If there was more than .05 percent, five one-hundredths percent, but less than .10 percent by weight of alcohol in such blood, such fact shall not constitute a presumption that the defendant either was or was not under the influence of intoxicating beverages, but such fact may be considered together with other competent evidence in determining the guilt or innocence of a defendant. Sub C: If there was .10 percent, one-tenth of a percent, or more by weight of alcohol in such blood, it shall

be presumed that the defendant was under the influence of intoxicating beverages. Does that conclude your case?

Hines: Yes, sir.

decision. One thing I always have trouble with in DUI cases and in situations where, as Mr. Rivers pointed out, there's no bad accident, there's no real physical harm done to anybody, that kind of thing, but realistically, when you have someone who had had three or four drinks in a period of by their testimony an hour to an hour and fifteen minutes, and presumably, from the testimony of the defendant, on an empty stomach, because he stopped to get dinner, you know, any number of people can do that and drive for miles and miles and never get caught. And the reason that Kentucky law says, and these instructions point out, under the influence is because there is a vast distinction between someone who's under the influence and someone who's drunk. Under the influence is just that measure that puts you in a slow reaction situation, in other words, the presumption that the Court gave you at close, just prior to the close of the case for the Commonwealth, are scientific presumptions. Now, of course, in order to believe those, you have to believe in science, and some of you may not. I choose to, but at any rate, those are scientifically tested measures and in Kentucky the scientifically tested measure that goes beyond someone completely in control of their physical ability to drive is .10 percent. Now whether we like it or whether we don't, that is the law. And that's what part of what you can't put aside. You have to follow that. Now, then you have to come to the question at that point, well, what about the test because

that is where the measurement came with the .17. Now anything in excess of .10, it's just presumed, it's not guaranteed, it's just presumed that person is under the influence, that would count for eleven, twelve, thirteen, fourteen, fifteen, sixteen, or in this case seventeen. Now, the test procedures were set out by the officer who administered the test. There's a little checklist that he read from. Trooper Ham explained to you about the 20 minute waiting period and that's to make sure that there's not any foreign substance ingested or actually thrown up, as the testimony was, that would affect the test in any way, and it was his testimony, and he had been an instructor of the breathalyzer school at the Academy, that there would be no appreciable difference on the test with dentures. There should be none from what it said. Now the other officer testified that he was advised that it may affect it. Well, I don't know which way, and he didn't say, and that's not before you, so I don't know what the answer to that is. All I know is that the

(Trial 12-2-1988)